Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming	)))	MB Docket No. 04-227

COMMENTS OF THE NATIONAL ASSOCIATION OF TELECOMMUNICATIONS OFFICERS AND ADVISORS AND THE ALLIANCE FOR COMMUNITY MEDIA

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INTRODUCTION

As the Commission and the General Accounting Office have confirmed, head-to-head competition between wireline overbuilders and incumbent cable operators results in significant benefits for consumers, including lower rates, better service and greater choice. As discussed below, such benefits are particularly pronounced when the overbuilder is a municipal communications provider.

Unfortunately, the incumbent cable providers are engaging in a range of anticompetitive practices to thwart competition from both public and private overbuilders. These practices include predatory pricing, targeted rate discrimination, denial of access to content, denial of access to customers, refusal to deal with contractors and suppliers, destruction of property, and an assortment of other unfair practices. In February 2004, the National Association of Telecommunications Officers and Advisors (NATOA) presented a report to the Senate Judiciary Committee that discussed dozens of examples of such conduct, and in these comments, it discusses some more recent examples. NATOA also urges the Commission to conduct a comprehensive study of the nature, extent, causes and effects of such practices.

Among the most problematic anticompetitive practice that new entrants face is targeted rate discrimination. That problem is exacerbated by the Commission's interpretation and administration of the term "effective competition" in the Cable Act and the agency's regulations. The Commission should re-examine the criteria that it uses to determine when and where "effective competition" exists, because those criteria do not enable the Commission to detect meaningful competition and, indeed, are used by incumbent cable operators for anticompetitive purposes.

Another significant problem for new entrants is the ability of incumbents to deny them access to important content. One shortcoming of the existing statutory/regulatory scheme is the so-called "terrestrial loophole" that allows incumbents to enter into exclusive contracts to tie up programming provided terrestrially rather than via satellite delivery. The Commission should do everything within its authority to eliminate this loophole and to encourage to Congress to enact legislation ensuring that competitors will have access to content of all kinds in the future.

As cable operators are deploying digital television, they are routinely violating Cable Act rules on charging equipment fees without regard to actual costs and are ignoring the Commission's tier buy-through regulations. The Commission should act vigorously to curb these practices.

Local governments are not creating barriers to entry through their management of public rights of way. Such management activities are adequately address under existing law, and the number of incidents that certain member of industry cite as evidence of the need for Commission intervention pale to insignificance compared to the vast number of daily right of way transactions that encourage competition and pose no problems for anyone.

Finally, in response to the Commission's inquiry, the Alliance for Community Media (ACM) presents a summary of the many creative ways in which communities are using Public, Educational and Governmental (PEG) access.

INTEREST OF COMMENTERS

The National Association of Telecommunications Officers and Advisors (NATOA) is a national association that represents local governments and those who advise local governments on telecommunications and cable issues. NATOA's membership is predominantly composed of local government staff and public officials, as well as consultants, attorneys, and engineers who consult local governments on their telecommunications needs.

The Alliance for Community Media (ACM) is a national nonprofit membership organization that educates and advocates on behalf of Public, Educational and Government (PEG) access to media. Since 1976, the Alliance has been "Building Community Through Media."

NATOA and ACM offer the following comments to the Commission on the status of competition in the market for the delivery of video programming.

I. HEAD-TO-HEAD COMPETITION BETWEEN WIRELINE OVERBUILDERS AND INCUMBENT CABLE OPERATORS RESULTS IN NUMEROUS BENEFITS FOR CONSUMERS AND LOCALITIES, PARTICULARLY WHEN THE OVERBUILDER IS A MUNICIPAL COMMUNICATIONS PROVIDER

As the Commission has found every year for the last several years, head-to-head competition between wireline overbuilders and incumbent cable operators results in numerous benefits for consumers, including lower cable rates, better service, and greater choice.[1] In two studies conducted within the last year, the U.S. General Accounting Office (GAO) has confirmed and refined the Commission's findings.[2] In particular, the GAO found that cable rates are

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1 *In the Matter of Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming: Notice of Inquiry*, ¶ 10, MB Docket No. 04-227, 2004 FCC LEXIS 3157 (rel. June 10, 2004) ("*Notice of Inquiry*").

2 *Id.*, citing U.S. General Accounting Office, *Issues Related to Competition and Subscriber Rates in the Cable Television Industry,* GAO-04-8 (Oct. 2003) ("*2003 GAO Report*") at

15-41 % lower in markets that have competition between a wireline overbuilder and an incumbent cable operator than in markets in which such competition does not exist.[3] The GAO also found that competition provided by direct broadcast satellite providers has a negligible effect on cable rates.[4]

The benefits for consumers and localities are particularly significant when the overbuilder is a municipal communications provider. Although municipalities would like to obtain net revenues from their own municipal communications systems, that is rarely a major factor in the municipality's decision to build and operate such a system. Rather, municipalities generally view advanced communications networks as a means to achieve the following major community goals:

- Robust economic development
- Lifetime educational and occupational opportunities
- Local, regional and global competitiveness
- Urban core revitalization
- Access to affordable modern health care

9-11; U.S. General Accounting Office, *Wire-Based Competition Benefited Consumers in Selected Markets,* GAO-04-241 (Feb. 2004) (*"2003 GAO Report"*) at 12-17.

3 *2004 GAO Report* at 12-17. The FCC's own rate comparisons over the last five years indicate that the cable rates averaged 6.5 percent lower in markets in which incumbent operators faced "effective competition" than in markets in which incumbents did not. *In the Matter of Implementation of Section 3 of the Cable Television Consumer Protection and Competition Act of 1992; Statistical Report on Average Rates for Basic Service, Cable Programming Service, and Equipment,* ¶ 23, 18 FCC Rcd 13284, 2003 FCC LEXIS 3751 (rel. June 16, 2003). The discrepancy between the GAO's figures and the FCC's figures is probably attributable to the fact that the FCC's standards for determining whether a market has "effective competition" significantly overstate the level of meaningful competition that actually exists, as discussed elsewhere in these comments.

4 *2003 GAO Report* at 9-11.

- Reduced congestion via telecommuting
- Fewer adverse environmental impacts
- More choice of programming, particularly programming geared to local interests
- Reduced dependence on increasingly large and unresponsive cable and telecommunications providers
- All the other factors that contribute to a high quality of life

As of the end of 2003, according to statistics compiled by the American Public Power Association (APPA), more than 570 community-owned electric utilities were providing some form of communications services, either internally or externally.[5] The following list sets forth the communications services that members of APPA provide externally and the number of utilities providing each such service:

■ Fiber leasing–156
■ Internet service provider–134
■ Cable television–109[6]
■ Cable modem–76
■ Long distance telephone–36
■ Broadband resale–128
■ Local telephone–43[7]

Municipal communications systems have contributed greatly to the well being of their communities, particularly as compared to similar communities that do not operate their own. A

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5 APPA, *Powering the 21st Century Through Community Broadband Services*, http://www.appanet.org/legislativeregulatory/industry/TelecomFactSheet050104.pdf. APPA is a national organization that represents the interests of the Nation's approximately 2000 community-owned, not-for-profit electric utilities.

6 A list of the cable systems that members of APPA operate is appended as Attachment A.

7 We do not have a comprehensive list of public entities that do not operate their own electric utilities but nevertheless provide one or more communications services. For example, a substantial number of such communities have begun to provide wireless broadband services in all or a portion of their communities.

good example of this can be seen by comparing the experiences of two neighboring cities in Iowa – Cedar Falls and Waterloo.[8] These two cities are very similar in all but one respect – economic development has surged in Cedar Falls, which operates its own advanced municipal communications system, and it has sagged in Waterloo, which does not operate its own municipal communications system. The Cedar Falls - Waterloo experience thus furnishes powerful evidence of the value that a municipal communications network can have for a community.

Across the United States, in places in which incumbent providers have not engaged in vicious anticompetitive practices, municipal communications systems have done well, particularly when viewed under the criteria that their communities have established for them. These criteria are not necessarily the same as the standards under which investors would judge private-sector cable operators. For example, the City of Glasgow, Kentucky, a community of 14,000 in rural Kentucky, has been providing cable services to its residents for more than 15 years. By the mid-1990s, Glasgow was offering its residents and businesses high speed Internet access at bandwidths of 4 Mbps – which is far greater than the bandwidth capacity that most subscribers in the United States can obtain even today. Throughout this period, Glasgow has established its rates just high enough to recover its costs and pay for periodic upgrades. Although the Glasgow system is not "profitable" under the criteria that apply to private-sector cable systems, it has enabled the residents and businesses of Glasgow to save more than $30 million in cable rates and keep that money circulating in the local economy. The same can be said of municipal communications providers across the United States.

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8 D. Kelley, *A Study of the Economic and Community Benefits of Cedar Falls Iowa's Municipal Telecommunications Network* (updated July 6, 2004), appended as Attachment B.

Furthermore, municipalities are also at the forefront of the growing movement to bring the United States into the age of truly high-bandwidth Internet access. As the United States Department of Commerce has observed,

> It is important to note here that the current generation of broadband technologies (cable and DSL) may prove *woefully insufficient* to carry many of the advanced applications driving future demand. *Today's broadband will be tomorrow's traffic jam*, and the need for speed will persist as new applications and services gobble up existing bandwidth.[9]

In the last year, the Bell companies have recognized the great benefits that our nation would achieve if it advanced rapidly to a fiber-based communications future. For example, on June 22, 2004, SBC issued a press release announcing that it was going to invest $4-6 billion over the next five years to extend fiber to the premises in various locations. According to SBC:

> Fiber technologies and IP-based services will enable a communications revolution, allowing consumers and businesses to experience integrated video, data and voice services beyond what can be provided over any network today. This next generation of services will require us to revolutionize our local networks as well, which we will do as economic and regulatory conditions make practical.
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> ...
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> SBC companies also are pursuing development of new services that can take advantage of the network's bandwidth. For example, SBC companies and Microsoft have begun testing an IP-based switched television service based on the Microsoft TV IPTV platform. This infrastructure would enable a new type of next-generation digital video entertainment experience, offering features like standard and high-definition programming, customizable channel lineups, video-on-demand, digital video recording, multimedia interactive program guides, event notifications and more. IP-based television services also will enable household TV devices to participate in connected home experiences with other devices in the home.[10]

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9 U.S. Dep't of Commerce, *Understanding Broadband Demand* at 6 (September 23, 2002), http://www.technology.gov/reports/TechPolicy/Broadband_020921.pdf.

10 http://home.businesswire.com/portal/site/google/index.jsp?ndmViewId=news_view&newsId=20040622005497&newsLang=en

The Bells' recent statements essentially validate what municipalities have been saying for years about the multiple benefits of fiber systems. Furthermore, at this point, it remains to be seen whether, or to what extent the Bells, will honor their promises. In the meanwhile, numerous municipalities and counties have already launched fiber systems, and many others are under study or development. The fiber systems already on line include Sylacauga, AL; Dalton, GA; Taunton, MA; Kutztown, PA; Jackson, TN; Provo, UT; Bristol, Virginia; Berkseth-Baldwin, Prairie View-Baldwin and Reedsburg, WI; and Chelan, Clallam, Douglas and Grant Counties, WA.[11]

In summary, if protected from anticompetitive practices of the kind discussed in the next section, municipal communications systems can bring major benefits to consumers and communities across the United States. The FCC should do everything in its power to encourage this.

II. ANTI-COMPETITIVE CONDUCT BY INCUMBENT CABLE OPERATORS IS A SERIOUS AND GROWING PROBLEM

Incumbent cable operators have engaged, and are engaging, in a variety of anticompetitive tactics to thwart competition from both public and private wireline overbuilders. Last February, NATOA presented testimony regarding these practices to the Senate Judiciary Committee, including a report that analyzed the statutes, regulations and FCC decisions that allow or encourage anticompetitive conduct.[12] The report included dozens of examples of

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11 Fiber to the Home Council/Telecommunications Industry Association, based upon data from Render Slice & Assoc., http://www.ftthcouncil.org/dbfiles/techexchange/2004%20-05-19%20OptFiberCommunList.pdf

12 Testimony of Coralie Wilson, President of NATOA, *Hearing on "Cable Competition – Increasing Price; Increasing Value?" Before the United States Senate Committee on the Judiciary, Subcommittee on Antitrust, Competition and Business and Consumer Rights*, (Feb. 11, 2004), http://judiciary.senate.gov/print_testimony.cfm?id=1041&wit_id=2953.

predatory pricing, rate discrimination, denial of access to programming, exclusion of competitors from multiple dwelling units, threats not to do business with contractors and suppliers that wanted to serve new competitors, and an assortment of other unfair business practices. To minimize duplication, NATOA will incorporate its testimony and report by reference and will focus here on the main points in these documents.[13]

A. Some Incumbent Cable Operators Are Engaging In Predatory Pricing

In the period since NATOA's report was completed in 2003, NATOA has not attempted to document each new occurrence of anticompetitive behavior by incumbent cable providers. NATOA knows, however, that such conduct is still commonplace.[14] NATOA provides below two examples of what appears to be predatory pricing, and it requests that the Commission perform a comprehensive study to determine the extent that predatory pricing and other anticompetitive practices are occurring across the United States and to develop effective ways to curb such practices.

Copies of Ms. Wilson's testimony and the accompanying report are appended as Attachments C and D.

13 NATOA did not vouch for the accuracy of all the examples provided in its report, as the information had come from a variety of sources, including pleadings, court decisions, media reports, and other public information, and had not been reviewed by the incumbent providers at issue. NATOA reiterates that qualification here. The Senate Judiciary Committee invited the National Cable & Telecommunications Association (NCTA) to respond to the report, and NATOA assumes that if NCTA and its members will respond here in their reply briefs, if they wish to do so. The Commission can then use its own investigatory tools to determine whose version of the facts is correct.

14 As NATOA's report reflects, the FCC has itself expressed growing concern about the anticompetitive practices of the major cable operators. See, e.g., *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming: Eighth Annual Report*, FCC 01-389 ¶¶ 196-209 (released January 14, 2002); *In the matter of Applications for Consent to the Transfer of Control of Licenses from Comcast Corporation and AT&T Corp., Transferors, to AT&T Comcast Corporation, Transferee, 17 FCC Rcd 23246*, 2002 FCC LEXIS 6127 ¶¶ 120-22 (rel. November 14, 2002).

Section 2 of the Sherman Antitrust Act, 15 U.S.C. § 2, provides that:

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

Predatory pricing is one of the many ways in which a would-be monopolist can violate Section 2 of the Sherman Act.[15] As the FCC has observed, "[p]redatory pricing involves 'deliberately pricing below cost to drive out rivals and raising the price to the monopoly level after their exit.' Thus, the offense of predatory pricing has two elements: a pricing element and a subsequent recoupment element." *Panamsat v. Comcast,* 12 FCC Rcd 6952, FCC 97-172 (released May 20, 1997), quoting *Price Cap Performance Review for Local Exchange Carriers,* 11 FCC Rcd 858, 870-871 (1995).[16]

The first example of current or recent predatory pricing involves MediaCom's pricing practices in Laurens, Iowa, in which it faces competition from the city's municipal cable system. MediaCom offered Laurens's customers a Family Cable package regularly selling for $23.25 a month for two months free and at half price for the next ten months.[17] When one does the math, the result is $9.69 a month for 12 months (($23.25 x 10 ÷ 2) ÷ 12 = $9.69). That amount was unquestionably below MediaCom's cost – without even taking its operating expenses and capital

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15 In other contexts, plaintiffs can also claim anticompetitive predation under the Robinson-Patman Act, 15 U.S.C. § 13(a) (as amended). The Robinson-Patman Act applies only to goods and commodities, however, and cable service does not qualify as such.

16 For the reasons set forth in Section II.A. of its report to the Senate Judiciary Committee, NATOA believes that the Commission has the authority to curb predatory pricing by incumbent cable operators.

17 Attachments E and F.

costs into account – as the cost for programming alone was nearly $15 a month (estimated by using the National Cable Television Cooperative rates).[18]

The second example comes from the Borough of Kutztown, PA, which owns and operates a fiber-to-the-home communications system. As the attached materials show, Kutztown has experienced a whole panoply of anticompetitive behavior, including predatory pricing, targeted rate discrimination (resulting in rates as low as $8 a month for programming costing more than $16 a month); denial of access to content; denial of access to customers in multiple dwelling units; destruction of property; misrepresentation of facts to the media; and lobbying to obtain legislation that would stop the municipality from providing competitive services.[19]

B. Incumbent Cable Operators Routinely Engage in Targeted Rate Discrimination Despite the "Effective Competition" Rules[20]

Targeted rate discrimination – carried out through programs euphemistically called "win-back" programs – is one of the most significant problems that new entrants face in trying to establish themselves against entrenched competitors. The FCC has itself noted the anticompetitive effects of these practices:

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18 In fact, MediaCom flatly admitted on the public record that it was not recovering it costs in Iowa cities that have municipal cable systems. Transcript of Hearing Before City Council of Emmetsburg, IA, September 23, 2002, Attachment G at 2. MediaCom's representative likened the company's strategy in these cities to being in a "gas war" in which a party drops rates until his competitor drops out of the market, and then he raises his rates again. *Id*. at 7.

19 Attachments H, I and J.

20 Our comments in this section concerning the "effective competition" rules address the Commission's inquiry seeking information on "head-to-head competition," and "information regarding areas where wireline competition once existed but failed," and "information on the characteristics of a particular area that make it more likely to support head-to-head wireline competition. . . ." *Notice of Inquiry* at ¶ 8. "We also request comment on whether there are any statutes or regulations that should be modified in light of changes in the video industry and competition over the past decade." *Id*. at ¶ 10.

> Although the Applicants deny that they have engaged in predatory pricing behavior, their representations leave open the substantial possibility that the Applicant may well have engaged in questionable marketing tactics and targeted discounts designed to eliminate MVPD competition and that these practices ultimately may harm consumers.
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> We also disagree with Applicants' claim that targeted discounts merely reflect healthy competition; in fact, although targeted pricing between and among established competitors of relatively equal market power may be procompetitive, targeted pricing discounts by an established incumbent with dominant market power may be used to eliminate nascent competitors and stifle competitive entry. ...
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> We do not agree with the Applicants that targeted pricing enhances competition. To the contrary, *targeted pricing may keep prices artificially high for consumers who do not have overbuilders operating in their areas because of the overbuilders' inability to compete against an incumbent who uses such strategies. Thus, we believe that targeted pricing as described in this record could harm MVPD competition.* Nevertheless, we are unable to conclude that this transaction will aggravate the problem. Accordingly, we decline to impose any conditions on the merger that would require the merged entity to post its rates and promotions on its website or otherwise facilitate the dissemination of pricing and discount information within local franchise areas.
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> *Mounting consumer frustration regarding secretive pricing practices and the threat that such practices pose to competition in this market suggest, however, that regulatory intervention may be required either at the local, state, or federal level*.

AT&T/Comcast Merger Approval Order ¶¶ 120-22 (emphasis added) (footnotes omitted)

Targeted rate discrimination programs have a common and critical feature – the incumbent does not offer its own subscribers the same special deals that it offers to subscribers who have transferred, or are threatening to transfer, their business to an overbuilder. If the incumbents had to offer the same deals to all of their own subscribers, they might well abandon this form of anticompetitive behavior.

For example, assume that an incumbent has 10,000 subscribers in a franchising area and that its nascent competitor has 1,000. Assume further that the incumbent estimates that offering the competitor's subscribers a discount of $20 a month for a year would attract 25 percent of the competitor's subscribers and significantly impair the competitor's business plan. The discount would cost the incumbent $60,000 ($20/month x 12 months x 25% x 1,000 subscribers). Even if the $60,000 was wholly or partially below cost, the incumbent would probably be willing to pay that price in return for the freedom to charge whatever it wanted *to all 11,000 subscribers* in the market after driving its competitor out. If the incumbent had to offer the same deal to all of its subscribers, however, doing so would cost it an additional $2,400,000 ($20/month x 12 months x 10,000 subscribers). In the latter case, the incumbent would probably decide that crushing its competitor was not worth the cost.

It was precisely for this reason that Congress enacted the uniform rate requirement in Section 623(d) of the Communications Act, 47 U.S.C. § 521(d), as part of the Cable Television Consumer Protection and Competition Act of 1992.[21] According to the FCC, the purpose of Section 623(d) was "'to prevent cable operators from having different rate structures in different parts of one cable franchise … [and] to prevent cable operators from dropping the rates in one portion of a franchise area to undercut a competitor temporarily.'"[22]

In the Telecommunications Act of 1996, acting on the assumption that the new Act would rapidly bring meaningful competition to the cable industry, Congress amended uniform rate requirement in Section 623(d) to add the following "effective competition" exception:

> This subsection does not apply to (1) a cable operator with respect to the provision of cable service over its cable system in any geographic area in which the video programming services offered by the operator in that area are subject to effective competition, or (2) any video programming offered on a per channel or per program basis. Bulk discounts to multiple dwelling units shall not be subject to this subsection, except that a cable

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21 Section 623(d) is quoted in full above.

22 *Telecommunications Act Implementation Order* at ¶ 95, quoting S. Rep. No. 92, 102d Cong, 1st Sess. 76 (1991).

> operator of a cable system that is not subject to effective competition may not charge predatory prices to a multiple dwelling unit. Upon a prima facie showing by a complainant that there are reasonable grounds to believe that the discounted price is predatory, the cable system shall have the burden of showing that its discounted price is not predatory.

As discussed in the next section, however, the effective competition determination itself is fraught with problems. While an “effective competition” exception may sound reasonable in theory, the FCC has interpreted “effective competition” in ways that render that term all but useless in identifying markets in which true competition can fairly be said to exist. To the contrary, the FCC’s interpretations have opened the door to precisely the kinds of anticompetitive behavior that Congress sought to prevent by enacting the uniform rate provision.

C. The Effective Competition Rules Are Antiquated, and Do Not Reflect a Truly Competitive State.

The Cable Act and the FCC’s implementing regulations relieve cable operators from a variety of regulatory constraints in markets in which “effective competition” exists. The premise underlying this is that regulation is no longer necessary when market forces are operating to keep the operator’s rates and practices in check. While the concept makes good sense in theory, neither Congress nor the FCC has performed any meaningful analyses to ascertain whether current standards for determining whether “effective competition” exist are efficacious. NATOA submits that the current standards are inadequate, unrealistic, and even counterproductive.

In a truly competitive market, regulatory relief is warranted, as regulation becomes less necessary where the market provides appropriate restraints. Unfortunately, a growing number of cable operators are using the inadequate “effective competition” test to achieve regulatory relief, without the presence of true competition to constrain their behavior. Competition is undoubtedly good; enabling predatory conduct clearly is not. The current “effective competition” rules, unfortunately, tend toward the latter.

It is critically important to understand the nature and extent of regulatory relief the industry is provided upon a finding of "effective competition." When a cable system is found to be subject to effective competition, that operator is immediately relieved of the following regulatory constraints: 1) basic service tier (BST) rate regulation by the local franchising authority, 2) anti buy-through provisions, which prevent cable operators from forcing subscribers to buy any service tier other than the BST to obtain additional programming, and 3) uniform rate provisions that require a similar rate for all subscribers in a geographic area. Premature relief from these provisions -- in the absence of competition that is effective in constraining rates and behavior -- harms consumers, enables predatory conduct, and ultimately leads to higher rates. A premature finding of "effective competition" gives the MSO incumbent the unfettered ability to undercut (using cross-system subsidies) a nascent competitor with below-market predatory pricing, with the ultimate result that competition is eliminated and prices return to monopoly rates.

Specifically, in Section 623(l) of the Telecommunications Act, 47 U.S.C. §543(l), Congress specified four criteria for determining where "effective competition" exists:

> (A) fewer than 30 percent of the households in the franchise area subscribe to the cable service of a cable system;
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> (B) the franchise area is--
>
> > (i) served by at least two unaffiliated multichannel video programming distributors each of which offers comparable video programming to at least 50 percent of the households in the franchise area; and
> >
> > (ii) the number of households subscribing to programming services offered by multichannel video programming distributors other than the largest multichannel video programming distributor exceeds 15 percent of the households in the franchise area;

> (C) a multichannel video programming distributor operated by the franchising authority for that franchise area offers video programming to at least 50 percent of the households in that franchise area; or
>
> (D) a local exchange carrier or its affiliate (or any multichannel video programming distributor using the facilities of such carrier or its affiliate) offers video programming services directly to subscribers by any means (other than direct-to-home satellite services) in the franchise area of an unaffiliated cable operator which is providing cable service in that franchise area, but only if the video programming services so offered in that area are comparable to the video programming services provided by the unaffiliated cable operator in that area.

While the FCC's implementing regulations in 47 CFR 76.905(b) largely mirror the statutory definitions of "effective competition," the Commission's interpretations of these definitions have essentially gutted them.

FCC's decisions applying 47 U.S.C. § 543(l) and 47 CFR § 76.905(b) are flawed in several respects.[23] For one thing, two or more cable operators often have overlapping franchises to serve an entire franchising area, but instead of overbuilding and competing with each other, they merely divide the market into non-competitive zones. Even though no subscriber has an actual choice between competing cable operators, the FCC has typically found that "effective competition" exists in these situations because the cable operators *might* compete with each other some day.[24]

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23 *See also Implementation of Sections of The Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation,* MB Docket No. 02-144, Comments of The National Association of Telecommunications Officers and Advisors, the National League of Cities, and the Miami Valley Cable Council, pp. 26-36 (submitted November 4, 2002) ("*NATOA Comments*").

24 *NATOA Comments* at 27. Notably, in its order approving the AT&T-Comcast merger, the FCC refused to apply a similar rationale in determining that Comcast and AT&T were not potential competitors in areas where they had contiguous systems. *AT&T/Comcast Merger Approval Order* ¶¶ 92-95.

Similarly flawed is the FCC's growing practice of determining "effective competition" solely on the basis of competition from Direct Broadcast Satellite (DBS) providers. Not only are such determinations fraught with evidentiary problems, but even assuming that competition from DBS providers can be established in a particular case, there is no evidence that competition from DBS providers exerts any downward pressure on cable rates.[25] The fact is that DBS 'competition' is not keeping rates down, no matter how much the cable industry may fear it. Thus, to depend on DBS is to abandon the Commission's responsibility under the law to protect subscribers from unreasonable rates."[26]

In its early cases involving the DBS test, the FCC appears to have been focusing on the prospect of rate *increases* by the incumbent. Now, however, the DBS test – and the FCC's precedents on it – have come into play in cases in which the incumbent's main purpose is to offer targeted discounts to thwart competition. A good example is the FCC's decision involving Arcadia, CA.[27] In that case, overbuilder Altrio Communications alleged

> [I]n November 2001, immediately before Altrio began its service launch and advertising campaign, Adelphia's rates were $33.33 for analog expanded basic service, and an additional $10.00 for digital expanded basic service and $39.99 for cable modem service. In addition, Adelphia offered expanded basic service at $19.95 per month, as well as cable modem service for $19.95 for the first three months of service, as a special promotion to new customers. Altrio indicates that

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25 Between June 30, 2001 and June 30, 2002, the Commission granted eight petitions for effective competition, representing 75 communities, based on competitive entry from LECs or their affiliates and DBS providers. *Ninth Annual Video Competition Report* ¶ 115.

26 *2003 GAO Report* at 9-11. Recognizing this phenomenon, the Senate Judiciary Committee has asked the GAO to develop another report, due later this year, on why competition from satellite providers does not appear to have any moderating effect on cable rates.

27 *Altrio Communications Inc. v. Adelphia Communications Corp.*, 17 FCC Rcd 22955, 2002 FCC LEXIS 6094.

after the launch of its service in December 2001, Adelphia offered an "extraordinary deal" to its existing customers for one year in which Adelphia increased its analog channels by twelve (57-69 channels), its digital channels by 81 (8-89 channels), dropped its rates to $19.95 for analog expanded basic service, charged only an additional $5.88 for digital expanded basic, and offered cable modem service for $19.95. Altrio also asserts that Adelphia customer service representatives engaged in "minute-by-minute" changes in its offers and short-term price cuts to retain existing customers contemplating a switch to Altrio, and to attract new customers.

Altrio Communications at ¶ 3. On their faces, these discriminatory rates plainly violated Section 623(d). Shortly after Altrio filed its complaint, however, Adelphia petitioned the FCC to find that it was subject to effective competition in Arcadia as of October 1, 2001, because two DBS providers, EchoStar and DirectTV, offered service in portions of the city. *Id*. at ¶ 5. The FCC agreed and dismissed Altrio's complaint. *Id*. at 6.

The FCC's interpretation of the fourth statutory criterion is also seriously defective.[28] When Congress fashioned the so-called "LEC test" in 1996, it intended the test to apply to the Bells and other major *incumbent* local exchange carriers, which Congress expected to become major and ubiquitous players in the cable industry.[29] The FCC, however, has applied the LEC

[28] Among incumbent "effective competition" petitions relying on the LEC test are: *In the Matter of Armstrong Communications, Inc.,* Petition for Special Relief, Opinion and Order, 16 F.C.C. Rcd 1039, 2001 WL 43378 (released January 19, 2001); *In the Matter of Charter Cable Partners, LLC,* Petition for Determination of Effective Competition, Opinion and Order, DA 02-2842 (released October 25, 2002); *In the Matter of Time Warner Cable Partners,* Petition for Effective Competition, CSR-5701-E (filed May 4, 2001); *In the Matter of AT&T CSC, Inc.,* Petition for Effective Competition, CSR-6015-E, DA 02-3376 (released December 9, 2002); *In the Matter of Paragon Communications, Inc. d/b/a Time Warner Cable,* Petition for Determination of Effective Competition, CSR-5901-E, DA 02-3599 (released December 27, 2002); *In the Matter of Kansas City Cable Partners Petition for Determination of Effective Competition in Overland Park, Kansas* (KS0064) Dkt. No. CSR-5993-E (Everest) (rel. February 3, 2003)

[29] *See, e.g., Implementation of Cable Act Reform Provisions of the Telecommunications Act of 1996*, 14 FCC Rcd at 5302 (1999). (Congress expected LECs to be "robust competitors of cable operators because of their financial and technical ability and … ubiquitous presence in the market.").

test indiscriminately to *competitive* local exchange carriers,[30] even to those with as little as 15% current market share and little, if any, possibility of building out the rest of their systems for up to 5½ years.[31] To make matters worse, in the absence of a homes-passed or actual subscribership standard under the LEC test, as there is under the other tests in Section 623(l), the FCC has found that "effective competition" can be found to exist as long as the LEC is *planning* to provide cable TV service in an area overlapping the incumbent's territory.[32] To be sure, the FCC has recently found that effective competition does not exist where a competitor "candidly admits that it has ceased construction and foresees failing to meet its franchise obligations."[33] Given the pro-competitive purpose of the "effective competition" test, a competitor should not have to be near the point of life support for the FCC to conclude that meaningful competition does not exist.[34]

In addition to the facial ineffectiveness of the effective competition rules, the Commission's recent decisions and other developments have placed local governments in a decidedly defensive position: in many cases, a determination of "effective competition" has

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30 *See, e.g.*, *Kansas City Cable Partners*, ¶ 9, 16 FCC Rcd 18751 (CSB 2001).

31 *Time Warner Entertainment Co. L.P. d/b/a Time Warner Cable*, 11 FCC Rcd 1872 (CSB 1997); *In the Matter of Texas Cable Partners, L.P., Petition for Determination of Effective Competition in Corpus Christi, Texas* (TX0205), Dkt. No. CSR 5676-E, (rel. March 7, 2002).

32 *Implementation of Cable Act Reform Provisions of the Telecommunications Act of 1996, Report and Order*, 14 FCC Rcd 5296, 5311-13 ¶¶ 28-30 (1999).

33 *In the Matter of: Kansas City Cable Partners; Petition for Determination of Effective Competition in Kansas City, MO (MO0199) (MO200)*, ¶ 8, 19 FCC Rcd 1445, 2004 FCC LEXIS 366 (rel. January 28, 2004).

34 So predictable have FCC rulings of "effective competition" become under the LEC Test, that some MSO's have not even bothered to file applications for such rulings before introducing discriminatory rate discounts.

more to do with whether the locality can afford to buy the evidence to rebut the petition, than with whether a truly competitive state exists.

The Satellite Broadcasting and Communications Association (SBCA) is the primary source of satellite subscriber data used by the cable for effective competition petitions. Until very recently, the SBCA refused to sell its data to any local franchising authority, placing the LFA in the position of gathering, distilling, and presenting the data on its own, which becomes a decidedly expensive proposition and obviously discourages the locality from opposing an effective competition petition (particularly in the rural and poorer communities which have frequently been targets of the petitions).

LFAs are now permitted to buy the data from the SBCA, but problems remain. The SBCA has priced 5-digit satellite subscriber data at $15 per ZIP code. It has priced 5-digit+4 data at $0.25 per 5+4 extension, translating to approximately $0.50 per street segment. Only the 5+4 ZIP code data enables an LFA to count the satellite subscribers in the local franchise area, while the FCC has accepted 5-digit data from the cable industry for many years (5-digit ZIP code data covers an area that is frequently much larger than the local franchise area.)

In essence, the SBCA has established a dual pricing scheme that favors the cable industry and disfavors local franchising authorities. Local government rate regulatory authority now hinges on whether it can afford to purchase the evidence from the SBCA.

Not surprisingly, therefore, many effective competition petitions go unopposed, and the FCC has not proactively delved into the veracity of the data presented by the incumbent petitioner. To the contrary, recent effective competition proceedings appear to have established a presumption in favor of the incumbent petitioner, and if the locality (often the only other interested party, in an area with no competition) cannot afford the evidence, it is almost certain that the area will not see head-to-head wireline competition any time soon.

NATOA believes that the data to rebut an effective competition petition should be available free to any affected community. One way to accomplish this may be to have the petitioning party foot the bill for data to be provided to the LFA. In the alternative, NATOA urges the Commission to be more proactive in its examination of the data presented by effective competition petitioners, and not grant such petitions merely because they are unopposed.

III. THE "TERRESTRIAL LOOPHOLE" THREATENS PROGRAMMING ACCESSIBILITY FOR CABLE COMPETITORS, AND SHOULD BE CLOSED

The Commission in various places in its *Notice of Inquiry* seeks comment on the issue of MVPD access to programming, migration to terrestrial delivery, and ramifications of increased clustering in the cable industry. *Notice of Inquiry* ¶¶ 13, 19, 25, 37. We are confident that the Commission will hear extensively from other commenters on the general topic of competitors' ability to acquire programming, but we wish here to focus specifically on the so-called "terrestrial loophole" in the program access rules.

The statutory requirements and FCC rules on programming access fall into three categories. First, Section 628(b) of the Communications Act, 47 U.S.C. § 528(b), sets forth a general prohibition on unfair practices by vertically integrated cable operators and satellite-delivered programming vendors. Second, Section 628(c) of the Communications Act, 47 U.S.C. § 528(c), prohibits vertically integrated cable operators and programming vendors from engaging in certain specific unfair practices. These practices include exertion of undue or improper influence on the programming vendor's prices, terms and conditions, and discrimination in establishing prices, terms or conditions (subject to several exceptions). And third, Sections 628(c)(2)(C) and (D) of the Communications Act, 47 U.S.C. §§ 528(c)(2)(C) and (D), prohibit vertically integrated cable operators and programming vendors from entering into, or renewing, exclusive contracts under most circumstances.

The program access statutes contain a vast loophole, however, in that exclusive contracts between cable operators and programming vendors are only prohibited if the programming is delivered by satellite. That is, if the programming is delivered terrestrially – via fiber optic cable, microwave, or otherwise – exclusive contracts are apparently perfectly legal. We believe this is a dangerous situation, and inconsistent with the notion of fostering a competitive environment.

As the Commission noted in its *Tenth Annual Report*, the cable industry is seeing a dramatic trend toward "clustering" – "Many of the largest multiple system operators (MSOs) have concentrated their operations by acquiring cable systems in regions where the MSO already has a significant presence, while giving up other holdings scattered across the country. ... Clustering creates efficiencies through scale and scope, and allows cable operators to serve geographically contiguous areas."[35] Clustering is here to stay, and the industry is likely to see more of it.

One effect of clustering is that programming may effectively be delivered among the clustered systems via terrestrial means, and terrestrial program delivery is certainly one of several benefits or economies of scale that can be achieved with clustered systems. And therein lies the danger. As clustering becomes an industry norm, and programming is increasingly delivered via terrestrial means, and as cable operators and programming vendors becoming increasingly vertically integrated, competitive cable operators face a very real danger of being

[35] *Tenth Annual Video Competition Report*, at ¶¶131-32.

left out in the cold with no way to access programming and other content that will be essential to their survival.

The FCC appears to be well aware of the significance of this gap: "We recognize that the terrestrial distribution of programming, including in particular regional sports programming, could have an impact on the ability of alternative MVPDs to compete in the video marketplace."[36] The FCC also recognized that vertically integrated entities "may have an incentive to shift regional sports networks from satellite to terrestrial distribution and thereby avoid the ambit of program access rules."[37] Furthermore, the FCC was aware that increased "clustering" in the cable industry could exacerbate the anticompetitive effects of terrestrially-delivered video programming.[38]

> [I]t is likely that cable systems in a large cluster will be linked through a fiber optic network which would enable operators to offer telecommunications services as well as a cost-efficient means of delivering programming to its clustered systems. However, if MSOs have an ownership interest in programming, fiber optic networks may give them an added incentive to 'migrate' programming from satellite delivery to terrestrial (fiber optic) delivery because only satellite-delivered programming is subject to the program access rules. Therefore ... a vertically integrated incumbent may be able to prevent competitors from gaining access to certain programming because it is terrestrially delivered.[39]

MSOs have responded to concerns about the terrestrial loophole issue by saying that critics have not shown that terrestrially delivery is being done to evade the program access rules,

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[36] *Id*. at ¶14.

[37] *Id*. at ¶173 (citing RCN Comments).

[38] *Exclusive Contract Report* at ¶ 47.

[39] *Eighth Annual Video Competition Report* at ¶ 142 (paraphrasing comments received in proceeding).

and that therefore there is no issue to consider.[40] We agree that clustering itself is not necessarily done for the purpose of evading the program access rules. But with all respect, that is beside the point. Clustering is occurring for a variety of reasons, and with it, terrestrial delivery. The point is that the clustering trend promises to continue, with the program access rules becoming increasingly irrelevant as delivery migrates to terrestrial means. Intent has nothing to do with it, although from the perspective of the MSO, the terrestrial loophole is perhaps a nice side effect of clustering, in that they may enter into exclusive programming deals to any extent they wish. Industry competitors, and ultimately consumers, lose out.

Nevertheless, the FCC declined to address terrestrially-delivered programming in its *Exclusive Contracts Report*, and appears to give credence to the incumbents' argument that, if it cannot be shown that the MSOs have shifted to terrestrial delivery for the purpose of evading the program access rules, that there must not be a problem. As explained above, we fundamentally disagree with such a conclusion.[41] Rather, we share the Commission's view that, "[t]o the extent that clustering raises concerns about a cable operator's ability to secure exclusive distribution rights for certain programming, such concerns would apply industry-wide .... The appropriate forum for consideration of this issue, therefore, is a rulemaking of general applicability."[42]

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[40] *See Tenth Annual Video Competition Report* at ¶ 132 (Comments of NCTA and Comcast).

[41] At the hearing before the Senate Judiciary Committee on February 11, 2004, Senators Kohl and DeWine stated that they were going to introduce a bill to eliminate the terrestrial loophole. To head off the bill, Comcast subsequently promised to drop its reliance upon the loophole on request. We know that Comcast did so in one instance – involving the City of Braintree, Massachusetts – but this is not a matter that should be left to the whim of cable operators. Besides, if cable operators in general are willing to forego reliance upon the loophole, then they should not oppose the FCC's or Congress's closing it, once and for all.

[42] *Eighth Annual Video Competition Report* at ¶12.

IV. IN DEPLOYING DIGITAL TELEVISION, SOME CABLE OPERATORS ARE IGNORING THE MANDATES OF THE CABLE ACT OF 1992[43]

A. The Commission Should Clarify Its Prohibition Against Additional Outlet Charges and Its Policies Concerning Customer Premises Equipment Cost Methodologies

As the rollout of digital television (DTV) has gathered momentum over the past couple of years, members of NATOA have become aware of an increasing tendency by cable operators to impose additional charges that are prohibited by the Cable Act of 1992 and the Commission's rules.[44]

For example, in 1993-94, the cable industry was divided between "whole house" and "per outlet" types of billing for services. The cost basis of equipment regulation under the statute, however, prevented the imposition of equipment rates that did not reflect additional cost to the operator – for example, monthly charges for the mere existence of an additional outlet. The FCC responded by promulgating Section 76.923(h) of the Commission's rules, which states (with emphasis added):

> *(h) Additional connection charges.* The costs of installations and monthly use of additional connections shall be recovered as charges associated with the installation and equipment cost categories, and at rate levels determined by the *actual cost methodology* presented in the foregoing paragraphs (e), (f), and (g) of this section. An operator may recover additional programming costs and the costs of signal boosters on the customer's premises, if any, associated with the additional connections as a separate monthly unbundled charge for additional connections.

Despite this prohibition on outlet charges that are not tied to actual costs, several cable operators have imposed arbitrary charges on subscribers for "additional outlets" when the

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43 *See Notice of Inquiry*, at ¶ 18 ("Program Packaging")

44 *See In the Matter of A La Carte Pricing and Programming for Cable Television,* MB Docket No. 04-207, Comments of the National Association of Telecommunications Officers and Advisors, filed July 15, 2004, at 11-13.

subscriber purchases digital services.[45] In fact, new "digital outlet" charges have become common in most systems.

Cable operators defend this practice on the ground that the charges are unregulated because they apply to unregulated digital services. This is a *non sequitor*. Outlet charges do not become unregulated just because they relate to digital services. On the contrary, as long as they are used to receive basic service, they remain regulated. Thus, the new additional outlet charges (called by a variety of different names) are still rate-regulated under the Commission's rules and must be set on an actual-cost basis.

In short, additional outlet charges for digital are prohibited under the Cable Act of 1992 and the Commission's rules.[46] NATOA urges the Commission to make this clear and to take action against cable operators that attempt to impose such charges without regard to actual costs. At the very least, the Commission should commence an open public proceeding to discuss the public policy issues involved.

In addition, as NATOA stated in a recent letter to the Commission in another proceeding,[47] policy questions relating to digital CPE cost methodologies are at the very least

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45 *See, e.g., Cable Advisory Council of Enfield Tier Buy-Through Complaint Against Cox Communications,* CSR 6313-B, September 19, 2003 (concerning Cox's "Digital Gateway" fee); Time Warner Cable – digital "Navigator" charge; Comcast – "Digital Additional Outlet" charge; Mediacom – told customers they must rent "equipment" called a "digital link" in order to purchase per-channel premium services (Cost of "digital link" is in addition to the rental of a digital converter. Price list says "digital link" includes "interactive guide, PPV access, and digital music channels." But not included as equipment item on Form 1025. (Atlanta, GA, April, 2004))

46 *See Comcast Cablevision of Dallas, Inc. et. al.*, CSB-A-0710, DA 04-1703 (June 14, 2004).

47 *In the Matter of Comcast Cablevision of Dallas, Inc. Order Setting Basic Equipment and Installation Rates, Farmers Branch, TX (TX0624), Request for Emergency Stay of Local Rate Order*, filed December 8, 2003.

unsettled and are worthy of further inquiry by the Commission. NATOA's letter was filed in response to a Stay Request in a local rate filing by Comcast Cablevision of Dallas, in which Comcast asserted that "there is no policy rationale for precluding operators using cost-aggregation from establishing different rates for different converters." Comcast went on to discuss the intent of Congress in establishing the equipment cost aggregation rule.

NATOA submits that the intent of Congress and the Commission's implementing rules should not be determined in a local rate proceeding that is nearly invisible to most of the local governments that might be affected. While NATOA disagrees with Comcast's interpretation of congressional and Commission intent, NATOA believes that such discussion should occur within the context of a rulemaking proceeding, with public notice and comment, and not as part of a Stay request. NATOA believes that the public interest is best served when all interested parties are informed and able to participate in the issues at hand.

B. Cable Operators Routinely Ignore Tier Buy-Through Rules

The Commission has requested information pertaining to the "tier buy-through" option that Section 623(b)(8) of the Communications Act prescribes. Specifically, the Commission seeks information about what problems are created by it and how cable operators are (or are not) making the option known to the public. *Notice of Inquiry*, ¶ 42.

Section 623(b)(8)(A), entitled "Buy-through of other tiers prohibited," states as follows:

> Prohibition.—A cable operator may not require the subscription to any tier other than the basic service tier required by paragraph (7) as a condition of access to video programming offered on a per channel or per program basis.

The Commission's implementing rules in 47 C.F.R.§ 76.921, entitled "Buy-through of other tiers prohibited," provide that

> No cable system operator, other than an operator subject to effective competition, may require the subscription to any tier other than the basic service tier as a

condition of subscription to video programming offered on a per channel or per program charge basis. A cable operator may, however, require the subscription to one or more tiers of cable programming services as a condition of access to one or more tiers of cable programming services.

Section 623(b)(8) and Rule 76.921(a) thus do not allow cable operators to impose a charge on customers for any tier of service above the basic tier in order to access programming on a per-channel or per-program basis. Similarly, cable operators cannot require subscribers to take any tier other than basic as a condition of access to premium or pay-per-view programming. It does not matter whether the extra tiers are analog or digital, or what kinds of services they may include. Moreover, the buy-through tier need not be video; the word "video" does not appear in the description of "any tier."

Despite these prohibitions, some cable operators have moved premium services from analog to digital over the past several years and are now assessing new charges on customers in order to keep what the customer already had. NATOA has gathered a number of examples of this type of conduct. Although NATOA does not have comprehensive information on this issue, the information that it has received on an informal *ad hoc* basis suggests that the prohibited conduct at issue is occurring on a widespread basis:[48]

- Montgomery County, Maryland: Comcast removed movie channels from analog CPST and placed them on digital tier only. Comcast sent letters to HBO and Comcast customers telling them that they must subscribe to digital service to receive premium and pay-per-view services. The local franchising authority understood the tier buy-through issue and told Comcast their conduct was prohibited. Comcast responded that it was an "innocent mistake." According to the franchise administrator: "Several of our customers called the FCC, who didn't understand the issue and also didn't answer it at all, even though it is a federal issue. (April 2004).

- Enfield, Connecticut: Cox required purchase of a tier of music services and an interactive program guide in order to acquire a premium service such as HBO. Cox referred to it as

[48] NATOA has not obtained the comments of all the cable operators in question.

a “digital gateway” charge. Complaint was filed with FCC in March, 2004 (CSR 6313-B).

- Northbrook, Illinois: Comcast removed Encore! from standard tier and moved it to digital, requiring subscribers to purchase the digital tier to obtain the premium channel they had already received. The lowest digital tier includes music channels and other video programming, to which the customer must subscribe if they wish to receive Encore! (April 2004).

- Mentor, Ohio: Comcast contacted customers and informed them that in order to continue receiving premium channels, subscribers must subscribe to digital. (April 2004).

- Atlanta, Georgia: MediaCom told customers they must rent “equipment” called a “digital link” in order to purchase per-channel premium services. Cost of “digital link” is in addition to the rental of a digital converter.

- Austin, Texas: Time Warner Cable told subscribers that they must have a digital converter to view Showtime and Cinemax and that this would also be the case for HBO in the future. At the same time, Time Warner Cable raised the monthly rate for a digital converter box from $5.95 to $7.34. (December 2002).

- St. Louis County: Charter Communications told premium tier subscribers that they must subscribe to the digital tier or they would lose their movie channels. Charter offered only three choice to existing premium subscribers:
    - A $10.95 “full” digital package, including digital converter box, remote, “digital access” (PPV + music), plus digital video programming services
    - A $9.95 package including digital converter box, remote and digital access
    - A $0 cost option: “cancel my premium channels”

While a small sample, these examples indicate that the tier buy-through rules and prohibitions are badly in need of clarification, reiteration, and/or enforcement.

V. LOCAL GOVERNMENT MANAGEMENT OF PUBLIC RIGHTS-OF-WAY DOES NOT CREATE A BARRIER TO ENTRY

The Commission has requested comment on barriers to entry into the market for the delivery of video programming, including the extent to which access to “rights-of-way, pole attachments, conduits, and ducts” may amount to a barrier to entry. *Notice of Inquiry* at ¶ 13. NATOA responded to these issues at length in its filing in the matter of *Inquiry Concerning Deployment of Advanced Telecommunications Capability to All Americans. . .* GN Docket No.

04-54, May 10, 2004 ("Section 706 Proceeding"), and will not restate its comments here. However, NATOA does wish to emphasize that local governments – while serving as the regulators and public stewards of rights-of-way and other publicly-owned facilities – should not be viewed as a barrier to entry but are best viewed as a cooperative facilitator of advanced telecommunications services. The Commission should not be predisposed to a conclusion that local governments stand as a barrier to advanced telecommunications services, or deployment of MVPD facilities and services for that matter.

Individual rights-of-way problems between industry and local government are few and far between. Local governments have worked diligently to embrace the principles of the Cable Acts and the Telecommunications Act of 1996 in their rights-of-way management policies, and the evidence of this is best demonstrated by the limited number of filings at the FCC regarding right-of-way management issues. We urge the Commission to not make national policy on any issue impacting local governments based upon a small number of complaints or anecdotal examples that may or may not be true.

In fact, local governments have used innovative solutions to encourage the deployment of broadband and cable systems for their constituents. Given the diversity of communities throughout this country there is, of course, no "one size fits all" approach to rights-of-way management, and local governments tend to bring their own unique approach to the equation that best fits their individualized needs. Local government is rightfully at the nexus of their citizens' needs and the industry's desires, and must balance these interests accordingly. Regulations and careful consideration of permitting requests help to protect the existing users of the rights-of-way and the services that citizens rely on every day.

It is crucial to recognize that the public rights-of-way are a valuable and limited resource held in trust for the public by the local government. In addition, rights-of-way are finite. While technology may permit more being placed in less space, as with spectrum, it still remains true that there is a sum total available to all users. And, as with spectrum sold to the highest bidder, there is a very real market value assignable to access to the public rights-of-way. It is public property that is being used for private gain. Requiring local government to provide telecommunications and cable companies' access to the public rights-of-way at direct cost, given that it is a limited resource, creates special treatment rules for this single industry, and provides a public subsidy to those providers.

Securing access to rights-of-way is not an impediment to timely broadband and/or cable system deployment. Industry claims of a widespread, national difficulty of securing access to rights-of-way as an impediment to a timely deployment are without merit: it appears that only three complaints have been filed with the Commission in the past four years.49

It is no secret that the telecommunications and cable industry would prefer to have the deployment of broadband and cable services subsidized through minimal cost and regulation over access to public rights-of-way. However, local government has a fiduciary responsibility to its citizenry to ensure that they receive compensation for private use of the public's property. It is also clear that good management and control, including regulatory oversight, can enhance the reliability of, and timely deployment of, advanced telecommunications and cable services throughout the nation.

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[49] *Section 706 Proceeding*, n.52.

VI. RESPONSE TO INQUIRY ON PUBLIC, EDUCATIONAL AND GOVERNMENT (PEG) ACCESS TO MEDIA

The *Notice of Inquiry* seeks comment regarding public, educational, and government ("PEG") access channels, including the number of channels currently being used by cable operators and the types of programming offered on such channels. *Notice of Inquiry* at ¶ 22. In addition, "[c]ommenters ... also are asked to provide information regarding the programming provided by DBS operators in compliance with public interest programming obligations . . ." *Id.*

According to the Alliance for Community Media (ACM), there are approximately 5,000 Public, Educational and Government (PEG) access channels in the United States. These channels are divided among 1,500 access operations with some cable systems providing as many as twelve channels to PEG and others providing one channel for all three purposes. 85% of all PEG channels are not operated by cable companies, but instead are operated by nonprofit entities (Public access), government agencies and educational institutions.[50] In instances in which cable operators actually "run" PEG channels, the programming may be similar to independently run PEG channels but rarely is as robust.

PEG programming encompasses a wide range of diversity and is typically reflective of the nature and demographic make-up of the community. Government access programming can range from coverage of community events and recognition of citizens, to information on government agencies and departments, to gavel-to-gavel coverage of city/county council meetings. Government access allows local (and national) government agencies to present their messages straight to the citizens without interference by commercial concerns.

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[50] Based on statistics published in the Community Media Resource Directory (CMRD), 2004. The Alliance for Community Media surveyed 1,500 access managers, receiving a 43% return on the survey.

Educational access programming is typically presented by universities and colleges, as well as K-12 school systems. School board meetings, school sports, academic competitions and after-school homework assistance programs are regular fare of K-12 channels. Distance learning (with or without credit), programs of interest to college students, campus arts performances, etc. are usually offered by university and college channels.

Public access is used by nonprofit groups such as the AARP, Disabled Vets, League of Women Voters, museums and arts organizations. Public access is also a "free speech" forum where any member of the community can bring in programming to be shown on the channel or be trained to produce programming of interest to them. Typical programming includes religious or political shows, local historical programming, shows by and about people with disabilities, children's programming, second language programming (such as Hmong, Farsi, Haitian, Portuguese, Russian, etc.) arts and performance programming, cultural programming, women's programming, travelogues and cooking shows.

The kind of local programming created for PEG is limited only by the imagination of individuals and groups in any given community. In addition, PEG provides the most comprehensive voter education programming on any video system. Candidates are invited to tape messages ranging from five minutes to an hour in length and are free to go directly to the public with their messages without interference of editors, commercialism or political hype. In many communities every race is covered from tax assessor to state senate.

In contrast to the way in which PEG serves the public interest, DBS does not provide the same opportunities to local communities. Even though DBS can now deliver "local into local," in order for PEG programming to be shown on DBS, PEG facilities would have to pay to be carried. This model must be changed. DBS providers must be held to the same standards as cable operators and provide public interest programming to the local community. The simplest solution would be to have DBS providers be charged up to 5% of their gross receipts (just like cable operators) at the "point of sale" and have that money go to fund PEG facilities, programming and operations. By doing this, DBS operators will truly meet their public interest requirements and truly serve the local community.

Respectfully submitted,

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